

Sethuraman (Migration) [2019] AATA 385 (22 January 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Suresh Sethuraman
CASE NUMBER:	1715506
DIBP REFERENCE(S):	CLF2013/262903
MEMBER:	Hugh Sanderson
DATE:	22 January 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221(2)(c) of Schedule 2 to the Regulations.

Statement made on 22 January 2019 at 11:45am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing relationship – living arrangements – living in separate Australian cities – only a temporary situation due to work demands – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 801.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 10 July 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 25 October 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied that the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Background

5. The applicant is a citizen of Malaysia and is currently 38 years old. He is sponsored in the application by Samini Manirajan who was born in Malaysia and is currently 34 years old. She was granted a subclass 885 Skilled visa in 2009 and now has the right to reside permanently in Australia.
6. The parties claim they first met each other in January 2010. Their relationship developed they were married on 1 September 2011. The applicant was granted a subclass 820 Partner (Temporary) visa on 31 March 2014.
7. Before assessing the grant of the subclass 801 Partner (Residence) visa the Department wrote to the applicant on a number of occasions requesting that he provide information to show that he was in a continuing relationship with the sponsor. The applicant did not respond to these requests or provide any further information to the Department. As no information was provided, the delegate not satisfied the parties were in a continuing relationship and therefore did not meet the criteria in cl.801.221(2). No information had been provided that the applicant would meet any alternate criteria and accordingly the delegate refused the application.
8. Since claiming to have been in a relationship with the sponsor, the applicant has travelled overseas with him on eleven occasions travelling to various places together.
9. The applicant provided various documents in support of the application including the following:
 - Statements by the parties;
 - Statements from friends confirming they believe the relationship is genuine participated in social activities with the parties;
 - The sponsor's superannuation beneficiary nomination form identifying the applicant as his sole beneficiary;
 - Joint bank account details;
 - Joint residential tenancy agreement; and

- Photos of the parties together.

10. The applicant appeared before the Tribunal on 22 January 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The applicant was represented in relation to the review by his registered migration agent who attended the hearing.
11. The parties provided consistent information as to various aspects of their relationship. This included the details of where they were living,, their financial arrangements, their work, their overseas trips together and other social activities they have participated in. The parties gave evidence in a straightforward and credible manner.
12. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the applicant is the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

14. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who has the right to reside permanently in Australia and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married in Malaysia on 1 September 2011. There is nothing to indicate that the marriage between the parties is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

17. The parties do not own any significant assets in their own names and, therefore, it is not surprising that they do not jointly own any assets. The parties have a joint bank account into which they deposit money from their own income and use to meet their day-to-day household expenses and holiday expenses. They provided details of their future financial plans including buying a home together. The applicant has access to the staff discount for their travel as the spouse of the sponsor.
18. Although limited, the Tribunal finds that the financial aspects of the relationship supported a finding that the parties are in a genuine and continuing relationship.

Household

19. The parties were sharing their home until the applicant obtained work in Newcastle in February 2018. As the sponsor's work was in Sydney and she was unable to find any comparable work in Newcastle, she has remained living in Sydney while the applicant has been living in accommodation, chosen by the sponsor, in Newcastle. The sponsor regularly travels to Newcastle to stay with the applicant in the apartment they have there.
20. The reason the applicant moved to Newcastle was that he was offered a three-year contract in a training hospital that will give him more stability and an opportunity to advance his career. He was, prior to this, only on one-year contracts. It is likely that the applicant will be able to advance his career in Newcastle and the sponsor plans to move to Newcastle to live with him and find employment there. The parties provided consistent information as to their plans for where they will live together in Newcastle.
21. Although the parties are currently living in separate cities, the Tribunal finds this is only a temporary situation due to the work demands of the applicant and that the parties do not live separately and apart on a permanent basis. The parties currently spend as much time as possible living with each other and plan to live permanently with each other in the future. The Tribunal finds that the parties have previously been living together in a household where the living arrangements indicated they were in a genuine and continuing relationship with a mutual commitment to a shared life as husband and wife. The Tribunal finds that the fact that the parties are living in separate households at the moment is only temporary and that they will be living together once their circumstances permit.

Social aspects

22. The parties provided numerous photos of themselves together with friends and relatives and have participated in various celebrations for themselves, such as their marriage, and with other people where they represent themselves as being married to each other and have been invited to events as a married couple. They have participated in holidays together as a married couple and have plans for future social activities together. Statements from friends and relatives have confirmed that they are recognised by their friends and family as being in a genuine relationship.
23. The Tribunal finds the social aspects of the relationship supported a finding that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship is genuine and continuing.

Commitment to each other

24. The parties were married in 2011. I have now been married for more than seven years. They initially lived together in Malaysia and had been living together in Australia since 2013.
25. The parties provided details of each other's work and other aspects of their lives. This included the sponsor providing details of the exams the applicant is about to face to advance his career. The sponsor has supported the applicant in advancing his career in Australia and has accepted the difficulties that this has caused them in the short term and the hope of long-term security. This indicates the parties provide each other companionship and emotional support and indicates that they consider their relationship as long-term.
26. The parties provided consistent information as to their plans for their future including where they would live, what type of home that would like to live in and whether and when they wish to have a family together. All this information supports a finding the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, that their relationship is genuine and continuing and that they live together or do not live separately and apart on a permanent basis.

Overall assessment

27. The Tribunal has considered all the circumstances of the parties both individually and cumulatively. The Tribunal is satisfied the weight of the evidence supports a finding that the parties have a mutual commitment to a shared life to the exclusion of all others, that their relationship is genuine and continuing, and that they do not live separately and apart on a permanent basis.
28. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant meets cl.801.221(2)(c).
29. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

30. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl.801.221(2)(c) of Schedule 2 to the Regulations

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).